

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2013

ORIGINAL

To be argued by
BURTON C. AGATA

United States Court of Appeals

FOR THE SECOND CIRCUIT

LAWRENCE ALFANO,

Petitioner-Appellee,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellant.

On Appeal from the United States District Court for the
Eastern District of New York

BRIEF FOR THE PETITIONER-APPELLEE

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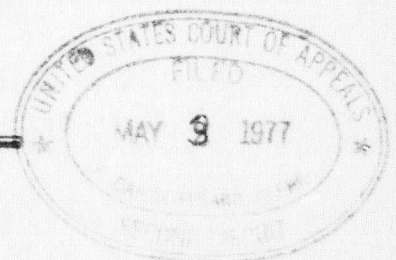


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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-2013

LAWRENCE ALFANO,
Petitioner-Appellee,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellant.

BRIEF FOR THE PETITIONER-APPELLEE

PRELIMINARY STATEMENT

This is an appeal by the United States from an order of the District Court for the Eastern District of New York, Costantino, J., entered on January 24, 1977 (A. 767) which granted a motion filed pursuant to 28 U.S.C. § 2255 (A. 588) and set aside a judgment entered on December 5, 1975, convicting the appellee on this appeal, Lawrence Alfano of possession of stolen airline tickets in violation of 18 U.S.C. § 659 ordering that

the government retry Alfano within 60 days of the order and further ordering that at any retrial the wiretap challenged by the motion be suppressed. The order was based upon the court's findings that: (a) there had been failure to present the tapes in question for judicial sealing in accordance with 18 U.S.C. 2518(8)(a); (b) that the failure to specifically raise the sealing issue was the "result of one or both of two causes: (1) inadequate opportunity to examine and develop the relevant facts, and (2) inadequate representation by counsel." (A.764); and (c) under the circumstances the failure to specifically raise the issue at trial did not constitute a waiver of his rights to do so in a § 2255 proceeding.

STATEMENT OF THE CASE

Proceedings Prior to the § 2255 Motion

On October 2, 1975, Alfano was convicted in a federal district court of knowledge and possession of stolen airline tickets. On December 5, 1975, he was sentenced to two years imprisonment which he began serving on June 1, 1976, after his conviction was affirmed on appeal.* Alfano was represented at the federal trial and on the appeal by Jonathan Rosner, Esq.

Inasmuch as Alfano had voluntarily appeared before a grand jury and stated he had purchased and possessed the tickets (A. 274-291; A. 590), the only real issue at the trial was whether Alfano actually knew the tickets were stolen. Crucial evidence of knowledge was the recorded wiretap conversations which are the subject of this § 2255 proceeding. (A. 600-607). These taps were conducted pursuant to a New York State court order. Mr. Rosner made a pre-trial motion to suppress the wiretaps on February 3, 1975, returnable February 21, 1975. (A.5) A hearing was held on May 9, 1975 before the Hon. Orrin G. Judd (A. 598). The government first delivered the documents relating to the tapes in question to Mr. Rosner, only moments before the hearing was to begin (A. 638-640, 633, 631). It also appears that the Court received the orders at 5:30 P.M. the night before, i.e. May 14 (A. 633). The papers received on that day were voluminous** They were about 1 1/2" thick

* He is currently released on bail.

** The papers delivered to Mr. Rosner constitute Defendant's Exhibit A at the § 2255 proceedings ' "Eavesdropping Warrants and Renewal Orders for September 1972 through October 1974 in New York Supreme Court and have been delivered to this Court as part of the record below.

and Mr. Rosner requested more time to enable him to "review" the papers and to "particularize" his objections (A. 638-39). The Court would adjourn the hearing only to May 15 despite Mr. Rosner's representations and affidavit he would be engaged in another trial (A. 639, 645). Mr. Rosner's affidavit, dated May 12, 1975, made it clear that he had not had the opportunity to further particularize his objections and complained of the failure of the government to respond to his notice of motion returnable February 21 and the one returnable May 9, (A. 646) and his being given the wiretapping papers on the morning of the May 9 "hearing" (A. 648).

The record with respect to the particular tap in question was inaccurate and required some tracing to determine that the tap involved in the sealing order in question related to the crucial tap at the trial. (Described at A. 592, end of par. 13, Dowd Affidavit). In addition, the affidavits underlying the sealing order were not delivered. (Gov't.Br. 6)

To further complicate the matter, there was a related criminal proceeding pending in the state court involving Alfano and others. Mr. Rosner was made aware of this proceeding and that motions to suppress were then pending before Judge Mollen (A. 625, 631-2). Judge Mollen suppressed the conversations which are the subject of this § 2255 proceeding on July 15, 1976 after a three week hearing held in December,

1975 (A. 660). The ground for suppression was inexcusable delay in seeking judicial sealing of the tapes.*

Mr. Rosner represented Alfano in the appeal of his federal court conviction and did not raise any issue with respect to the legality of the taps or with respect to the failure to comply with the sealing requirement. The conviction was affirmed on May 6, 1976. In a letter apparently reflecting a dispute over fees or Alfano's failure to pay \$1100 due Mr. Rosner, Mr. Rosner advised Alfano that he would complete the appeal but would "not do so with any great degree of interest." (A 765)

The § 2255 Petition

A § 2255 petition commenced in September 1976 (A. 586) by order to show cause based on the affidavit of Michael Dowd and the attachment thereto (A. 586-97) on the grounds that Alfano's conviction was had in violation of the laws of the United States [18 U.S.C. 2518(8)(a)] and in violation of his constitutional rights under the fourth, fifth and sixth Amendments (A. 588). A memorandum of law was submitted (R. 2) to which the government responded (R. 3) and Alfano replied (R. 4).** Judge Costantino released Alfano on bail

* On June 22, 1976, this Court decided United States v. Gigante, 538 F.2d 502 (2d Cir. 1976).

** Legal argument was heard by Judge Costantino on September 17, 1976 (R. 13).

pending determination of the motion (R. 5,7). On December 21, 1976, Judge Costantino filed a memorandum, which in substance found the relevant facts in favor of Alfano and ordered a hearing in which the government would be given the opportunity to present evidence excusing the delay in complying with the sealing requirements of 18 U.S.C. 2518(8)(a). No such evidence was offered. Instead the government persisted in its position that the sealing issue could not be raised at all in § 2255 proceeding and that, in any event, Alfano had waived the deficiency by failing to raise it at trial. The government also offered an affidavit by Mr. Rosner (A. 724).

In his affidavit, Mr. Rosner stated:

(1) He had been receiving information concerning the state proceedings throughout "virtually all of the proceedings" (A. 725).

(2) Mr. Rosner also explained that his choice of language concerning his lack of interest in the appeal was unfortunate, but he did not, in fact, fail to raise issues concerning sealing because of this factor (A. 727-28).

(3) However, Mr. Rosner did describe the circumstances under which he was compelled to consider the eavesdropping issues (A. 725-26):

In response to a concededly broad motion by us addressed to the legality of the electronic eavesdropping involved in this and several

related indictments, on May 9, 1975 the Court held a "hearing" (see Exhibit "A" annexed to the moving papers). In Court, at the outset of the "hearing" (which Mr. Kaplan attended together with the affiant, see Exhibit "A", supra at page 18 et. seq.), Government counsel delivered to the attorneys present an impressive quantity of judicial orders and returns bearing upon the eavesdropping involved in the several cases before the Court. As the present attorney for Defendant-Petitioner Alfano appropriately observes, there was no time whatsoever for particularization of any challenge to the eavesdropping as the Court required, and, as the record indicates, the adjourned date for the "hearing" as fixed by the Court was in conflict with a prior trial engagement which I had and which I then made known to the Court. During the "hearing" the Court evidenced an awareness of the contents of the papers just tendered to counsel as well as a determination by another Member of this Court in the same or a related matter. It is my understanding that subsequent to the adjourned "hearing" which I was unable to attend due to a prior trial engagement, the Court reviewed all of the documents and embodied its determination in a formal Memorandum.

Quite aside from the record itself in respect of the eavesdropping matters involved in this case, as the counsel for Defendant-Petitioner Alfano observed in the instant application the telephone number on the transcript of the conversation which Government counsel expressed an intention to offer on trial did not relate to the telephone number designated on any of the judicial orders submitted to counsel. It was this fact, among others, that caused your affiant repeatedly to observe to the Court that the materials which we had been furnished with appeared to be incomplete and inadequate for the purposes of the applications. Further confirmation of that appeared to come from the fact that during the trial itself, Government counsel learned of the existence of other eavesdropped conversations which it then sought to offer against Defendant-Petitioner Alfano as to which the Court sustained our objections after lengthy argument.

Mr. Rosner also noted the following (A. 729):

Apparently the state court hearings in respect of eavesdropping continued from time to time from

in or about May, 1975 through in or about December, 1975, resulting in the order referred to in the moving papers in or about July, 1976, which contrasts sharply with the time afforded the same issues in this Court and the seemingly summary disposition of the issues herein.

The Trial Court's Findings.

Judge Costantino made the following findings:

(1) A claim of violation of 18 U.S.C. § 2518(8)(a) sealing requirements is cognizable under 28 U.S.C. § 2255 (A. 763).

(2) Alfano "did not waive his rights by failing to raise the issue at trial. The failure to object was not a result of deliberate strategy. . .

Rather it appears to have been a result of one or both of two causes: (1) inadequate opportunity to examine and develop the relevant facts, and (2) inadequate representation by counsel." (A. 764)

(3) The Court also found that the record presented "exceptional circumstances" warranting § 2255 relief when the "quality of representation is examined in conjunction with the failure to provide adequate time prior to hearing for the examination of the wiretap order" (A. 765).*

The relevant facts summarized in the memorandum opinion are as follows (A. 764-65):

Prior to the commencement of his trial in federal court, petitioner moved to suppress the tape. The wiretap orders were not turned over to his attorney for inspection, however, until the day of the hearing. Petitioner's counsel was therefore not able to read them prior to the hearing (transcript of hearing, May 9, 1975, p. 37). As a result,

* The court found it unnecessary to determine whether the disinterest of the attorney coupled with failure to raise the sealing issue rose to the level of inadequate representation (A. 765).

the hearing before Judge Judd was not sharply focused and apparently no ruling was made. Further argument was scheduled for a later date to enable more thorough review of the orders. Prior to the adjourned date, however, petitioner's counsel submitted an affidavit indicating that he was "not in a position to prepare further for trial," and indicating that he was prepared to accept the "ruling" of the court not to suppress (although there is no indication from the transcript that such a ruling was made). And, although petitioner's attorney raised various objections to the wiretap both at the hearing and in his affidavit, he did not question the lack of judicial sealing despite his awareness of the related state court proceeding in which Justice Mollen eventually suppressed the tape for lack of sealing (Tr. of hearing 5/9/75, p. 29, 35-36). Furthermore, at the time the case was on appeal, petitioner's attorney wrote a letter to petitioner complaining that he had not been paid and declaring

We shall complete the appeal on your behalf since we have indicated to the Court we will do so, although I must state that I do not do it with any great degree of interest, and also indicate that we will not, under any circumstances, engage in any post-appeal motions which we had earlier discussed, in the event your conviction is affirmed. (emphasis added).

A R G U M E N T

POINT I. A FEDERAL CRIMINAL CONVICTION
MAY BE ATTACKED UNDER 28 U.S.C.
§ 2255 ON A CLAIM OF VIOLATION
OF 18 U.S.C. 2518(8)(a).

The United States, in urging reversal, relies essentially on the teaching of Stone v. Powell, ____ U.S. ____, 96 S.Ct. 3037 (1976) (Br. 16). Its reliance is misplaced. Stone v. Powell, in substance, holds that federal habeas corpus cannot be used to collaterally attack a state criminal conviction on the grounds that evidence obtained in violation of the search and seizure provisions of the Fourth and Fourteenth Amendments was admitted in the state trial where the petitioner has been afforded the opportunity for full and fair consideration of the issue in the state proceedings. Thus, there are three main elements to the Stone rationale: (1) collateral attack of a state conviction in a federal court under 28 U.S.C. § 2254; (2) the basis for the attack; to wit, the exclusionary rule of Mapp v. Ohio; and (3) the presence or absence of opportunity for full and fair consideration of the issue in the state court where the conviction was had. The case at bar is distinguishable from Stone on all three factors.

The federalism element.

First, Alfano's attack on a federal conviction does not involve any of the principles of federalism

and comity presented by a collateral attack on a state conviction. Dictum in Stone appears to bar a Mapp v. Ohio - exclusionary rule based § 2255 attack on a federal conviction in the absence of the special showing required by Stone. However, the Court was careful to state that a collateral attack pursuant to § 2255 on a federal conviction is not wholly barred where the supervisory power of the federal court is invoked even when unlawful search and seizure is the issue. Collateral attack on a federal conviction under § 2255 is barred only to the extent it "[rests] on constitutional rather than supervisory grounds. . ." Tisnado v. United States, 547 F.2d 452, 456 (9th Cir. 1976), citing Stone v. Powell, ____ U.S. ____, 96 S.Ct. 3037, 3045, n. 16 (1976).**

Integrity of the evidence.

Second, even if Stone v. Powell is read as barring collateral attacks on federal as well as state convictions it does not by force of its own reasoning apply to an attack based on violation of 18 U.S.C. 2518 (8)(a) sealing requirements. In Stone, the Court viewed the Mapp v. Ohio exclusionary rule relied on in that case as a prophylactic measure

* The propriety of such a collateral attack was recognized in Kaufman v. United States, 394 U.S. 217 (1969) and rejected in Stone v. Powell, ____ U.S. ____, 96 S.Ct. 3037, 3045, n.16 (1976).

**For the key role of the federalism element, see, Stone v. Powell, 96 S. Ct. 3037, 3051, n. 35 (1976).

designed to deter the police and not as one related to the integrity of the evidence. The sole object of the exclusionary rule was police deterrence and the Court concluded that, on balance, permitting collateral attack under § 2254 (and apparently § 2255) so remote in time did not sufficiently advance this prophylactic purpose when other consequences were taken into account. Stone v. Powell, ___ U.S. ___, 96 S.Ct. 3037, 3044,,3046-49 (1976).

A key basis for Stone v. Powell, supra, at 3050. concerns the kind of evidence which was being attacked: "the physical evidence sought to be excluded is typically reliable." Neither of these factors is present in the case at bar. Here, it is not "physical evidence" which is sought to be excluded, but rather tapes of conversations. Further, concern with the integrity of the evidence led this court in United States v. Gigante, 538 F.2d 502 (2d Cir. 1976), to adopt an exclusionary rule for violation of 18 U.S.C. 2518(8)(a). This Court characterized the danger to the "integrity of. . .[the] fruits" of electronic surveillance as "the serious peril . . . [28 U.S.C. § 2518(8)(a)] was designed to avert." United States v. Gigante, supra, at 503. The section plays a "central role in the statutory scheme" " of "[m]aintenance of the integrity of such evidence" United States v. Gigante, supra,

at 505. This court voiced its "agreement" with the conclusion that any remedy short of exclusion " 'would completely undercut the statutory purpose of protecting the integrity of the tapes'", United States v. Gigante, supra, at 507.

Clearly, then, the basis for Stone v. Powell, physical evidence and lack of concern with the integrity of the evidence, is not present in this case and, hence, Stone v. Powell, supra, provides no basis for reversing the court below.

Opportunity for a full and fair hearing.

With respect to the third leg of Stone v. Powell, the presence of an opportunity for a full and fair hearing, the court below made a finding that there had been an "inadequate opportunity to examine and develop the relevant facts." (A. 764) If this finding is not clearly erroneous, and it is submitted that it is not only not clearly erroneous, but correct, then even the full application of Stone v. Powell to the facts of this case would require affirmance of the District Court's judgment.* The further significance of the court's finding concerning the opportunity for a hearing is considered at pages 18 - 19 , infra.

* The tapes would necessarily be suppressed on the authority of United States v. Gigante, 538 F.2d 502 2d Cir. 1976), inasmuch as the United States seeks to offer no legally sufficient excuse for the 85 day delay in seeking judicial sealing (Gov't. Br. 13).

Conclusion with Respect to Stone v. Powell.

The foregoing makes it apparent that Stone v. Powell cannot be relied on to dispose of this appeal in favor of the United States. Arguably, it does not apply to the case at bar at all. The more persuasive view, however, is that Stone v. Powell's reservation of supervisory power over the federal courts under § 2255, the fact that this case involves non-physical evidence admitted in violation of a rule designed to protect the integrity of the evidence and the finding that there was an inadequate opportunity for a hearing require sustaining the judgment of the trial court.

The Scope of Relief under § 2255.

The United States further argues that the court has no jurisdiction in a § 2255 to entertain an attack on a federal conviction based on failure to comply with the provisions of 18 U.S.C. § 2518 (8)(a).^{*} Neither the authorities relied on, sound principle nor the facts of this case support this view.

Turning first to the authorities relied on by the United States. The prime authority is United States v. Wright, 524 F.2d 1100 (2d Cir. 1975), which the government's brief at page 17

^{*} There is no question that non-constitutional claims are cognizable under § 2255. Davis v. United States, 417 U.S. 333 (1974).

characterizes as involving denial of § 2255 relief in "circumstances almost identical to that here." Wright involved a claim of failure to obtain advance approval of the Attorney-General or his designate to obtain an extension order for a wiretap. The petitioner, Wright, in that case claimed that the information obtained from that wiretap played a part in obtaining an otherwise proper order for another wiretap.* Suppression of this last wiretap was sought in the § 2255 proceeding. In denying the availability of § 2255 to Wright, the court found that he had no standing to attack the apparently illegal extension order and characterized the claim as involving a "technical procedural error." Thus, even if one accepts the doubtful proposition that Wright is a holding concerning the scope of § 2255 with respect to wiretaps, it involved a violation of Title 18 wholly unlike the one at bar. United States v. Gigante, supra, surely disposes of any claim that the judicial sealing requirement of 18 U.S.C. 2518 (8)(a) is merely a technical procedural requirement.**

The United States would apply to this case the argument suggested in Zangarino v. West, 422 F.Supp. 812,

* The trial court rejected this contention and found the contrary. United States v. Wright, supra, at 1102.

** None of the cases cited deal with the sealing issue. Zangarino v. West, 422 F.Supp. 812 (S.D.N.Y. 1976) (Gov't Br. 17), involves a claim similar to the one in Wright, supra. Cf., United States v. Consiglio, 391 F.Supp. 564 (D. Conn. 1975). In United States v. West, 494 F.2d 1314 (2d Cir.) cert. denied, 419 U.S. 899 (1974) (Gov't Br. 17) there was a deliberate by-pass of direct attack procedures. In Alfano's case, the court found no deliberate by-pass. (A.763).

None of the string of citations at the top of page 18 of the government's brief involve wiretapping. Most involve advice with respect to parole

819 (S.D. N.Y. 1976) (Gov't. Br. 19) that a failure to comply with a procedural rule designed to determine if the Fourth Amendment requires suppression of evidence should be treated the same way as a claimed violation of the Fourth Amendment would be treated for purposes of collateral attack. That is, Stone v. Powell would preclude consideration of such a violation under § 2255 (or § 2254). Even if this position is accepted, it in no way disposes of Alfano's claim. In cases like Zangarino, supra, (and Wright), where the claim is that the wiretap evidence was obtained without proper authority, the analogy with unreasonable searches and seizures is tenable and perhaps correct. There, as with other Fourth Amendment requirements for search and seizure, the interest to be protected is that of privacy from arbitrary invasions by governmental authority. On the other hand, the requirement of judicial sealing is not designed to protect against the fact of invasion. By hypothesis, invasion has already occurred and such invasion may well have been lawful. The sole purpose of sealing is to protect the integrity of the evidence seized and this goal, as even the government urges throughout its brief, is neither the object nor the effect of enforcing the exclusionary rule derived by Mapp v. Ohio from the Fourth Amendment. The court in Zangarino recognized that not all the Title 18 wiretapping procedures are designed to implement the Fourth Amendment prohibitions against unreasonable

** (continued)

limitations in guilty plea cases and even they recognize the availability of § 2255 under appropriate circumstances. See, e.g., Bachner v. United States, 517 F.2d 589 (7th Cir. 1975), McRae v. United States, 540 F.2d 943, 945, n.2 (8th Cir. 1976); Gates v. United States, 515 F.2d 73 (7th Cir. 1975).

invasions of privacy when it carefully limited its statement now relied on by the United States. Indeed, the rationale of the Zangarino proposition relied on by the government actually supports Alfano's position that a claim based on lack of judicial sealing is cognizable under § 2255.

POINT II. UNDER THE CIRCUMSTANCES OF
THIS CASE THE MOTION UNDER
§ 2255 SHOULD BE GRANTED.

The foregoing demonstrates that none of the reasons assigned by the United States for limiting the scope of § 2255 to automatically preclude a claim based on a violation of 18 U.S.C 2518(8)(a) lead to that conclusion. On the other hand, there are good reasons for permitting the claim to be raised and particularly good reasons for doing so in this case.

The first reason is simply that there was no real opportunity for Alfano to raise the issue of sealing at the trial. Judge Costantino so found as a matter of fact (A. 764) and in Mr. Rosner's affidavit submitted by the government he points out forcefully the impossibility of the situation (pp. 6-8, supra). The lack of opportunity was not only the result of the trial court's haste in compelling Mr. Rosner to proceed, but a direct result of the United States Attorney's failure to respond to either of the motions returnable February 21, 1975 and May 9, 1975 (A.645,646). It will be recalled that even Stone v. Powell, supra, at 3045, n. 16, preserves the federal court's supervisory powers over its own proceedings. It is appropriate for the court to exercise this power in a case where an inexcusable failure

to timely provide papers over a period of several months places defense counsel in the impossible position of having to particularize claims without the opportunity to examine the papers. The United States should not then be heard to claim that the defense counsel did not raise an issue which required detailed examination of those papers.

Second, without deciding whether Alfano was denied effective assistance of counsel,* the combination of his attorney's expression of disinterest and the failure to raise the sealing issue despite contact with those involved in the state proceeding, should lead the federal court to afford Alfano a clear and unblemished opportunity to have the sealing issue resolved.

Third, there can be no doubt that the conversations challenged in this proceeding would be suppressed under United States v. Gigante, 538 F.2d 502 (2d Cir. 1976) as they were suppressed in the state proceeding .

These contentions are all supported by findings of the court below and these findings are amply supported by the evidence. The lack of opportunity to raise the issue

* Alfano still maintains his position taken in the court below with respect to this issue but that court not having ruled on the point, if the judgment is not affirmed, it would appear a remand is required for the court below to make its findings.

because of the delay by the United States Attorney, the haste of the trial judge and the possible disinterest of his own defense counsel, presents a situation unique for relief under § 2255 and the avoidance of a miscarriage of justice.

C O N C L U S I O N

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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